IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 24, 2007

FLOYD "BUTCH" WEBB v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Rhea County
No. 16364 J. Curtis Smith, Judge

No. E2006-02352-CCA-R3-PC - Filed September 7, 2007

The Petitioner, Floyd "Butch" Webb, appeals the denial of his petition for post-conviction relief claiming he did not receive the effective assistance of counsel. After a thorough review of the record and applicable law, we conclude the Petitioner was denied the effective assistance of counsel in three of his four misdemeanor child abuse convictions (Counts 1, 3, and 4). We also conclude that the Petitioner received the effective assistance of counsel in his convictions for child abuse (Count 2), aggravated sexual battery (Count 7), and two counts of sexual battery (Counts 9 and 11). Accordingly, we affirm in part and reverse in part the post-conviction court's judgment, and we dismiss the Petitioner's convictions in Counts 1, 3, and 4.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Reversed in Part

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which J.C. MCLIN and D. KELLY THOMAS, JR., JJ., joined.

Keith H. Grant, Dunlap, Tennessee, for the Appellant, Floyd Butch Webb.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; J. Michael Taylor, District Attorney General; William Dunn, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts

In 2002, the Petitioner was tried on four counts of aggravated sexual battery, two counts of rape of a child, two counts of rape, and four counts of incest. The evidence against the Petitioner included a number of individuals who testified that the Petitioner, who was the victim's stepfather, was very controlling and kept the victim from visiting friends or playing outside for more than twenty minutes at a time. The victim testified that the Petitioner sexually assaulted her over a period

of five years, from 1995 until 2000. A nurse practitioner who examined the victim testified that the examination revealed a "cleft" on the victim's hymen that would be consistent with the victim's allegations.[1] A jury convicted the Petitioner on one count of aggravated sexual battery, and the lesser-included offenses of two counts of sexual battery and four counts of child abuse.

At the hearing on the Petitioner's petition for post-conviction relief, the following evidence was presented[2]: the Petitioner's trial counsel ("Counsel") testified that he first met with the Petitioner around August 11, 2000, which was his "bound-over day." That meeting concerned Counsel's appointment, the Petitioner's bond, and a determination of the Petitioner's next court dates. The next meeting occurred on August 18, 2000, when the public defender's investigator met with the Petitioner to ascertain names, dates, and the general "feel" of the crime. Either the investigator or Counsel met with the Petitioner on February 3, 2001, March 9, 2001, April 5, 2001, April 10, 2001, April 19, 2001, November 7, 2001, January 14, 2002, January 15, 2002, and January 23, 2002. Counsel described in a fair amount of detail what occurred at these meetings, including discussions with the Petitioner about the details of his case and his version of the events, the charges, ranges of punishment, any potential motive that the victim and the victim's mother may have had for accusing him of the crimes, and the Petitioner's potential trial testimony. During these meetings with the Petitioner, the Petitioner's mother, sister, and brother-in-law were often present, and Counsel discussed the case with them also.

Counsel admitted he probably did not interview the victim or the victim's mother prior to trial, which he deemed a strategic decision as he did not want them to know what his questioning would concern prior to trial. Counsel stated that he believed before trial that his witnesses, including the Petitioner's brother-in-law, could adequately testify that the victim would frequently make up stories, and he declined to have the Petitioner's sister testify, because her testimony would have been cumulative. Additionally, Counsel believed the Petitioner's brother-in-law would be more credible than the Petitioner's sister. Counsel further stated that he spoke with one of the State's witnesses, Matt Pressley, the day before trial, but he did not interview any of the "neighborhood kids" prior to trial. Although he would have liked to have had time to do this, it was not essential because he was able to review all of the State's evidence prior to trial. Counsel testified, however, that he did interview Dana Morgan with the Department of Children's Services, Chris Sneed with the police department, Kathy Spada with the Children's Advocacy Center, and all of his own witnesses.

Counsel testified that he filed multiple motions on the Petitioner's behalf, including a motion for individual juror voir dire to determine if any of the potential jurors had been victimized before, a "blanket discovery" motion, a motion for a Bill of Particulars, a motion to determine if the victim had made any prior accusations, a motion for exculpatory evidence, a motion for written or recorded

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[1] A more complete and detailed version of the facts can be found in this Court's opinion from the Petitioner's direct appeal. *See State v. Floyd "Butch" Webb*, No. E2002-01989-CCA-R3-CD, 2004 WL 199824, at *1-12 (Tenn. Crim. App., at Knoxville, Feb. 3, 2004).

[2] We have included only the facts relevant to the Petitioner's claim that he did not receive the effective assistance of counsel.

statements of the victim, and a motion concerning any prior sexual activity on the part of the victim. Counsel further testified that he made a motion to suppress a portion of a statement made by the Petitioner, and he won on that issue. The rest of the statement, which contained the Petitioner's protestations of innocence, was not argued against because Counsel believed it was helpful. Counsel did not file a motion to sever the offenses because he did not want the State to have three opportunities to convict his client. Counsel did not file a motion to change venue because he believed it was unnecessary because there was little pre-trial publicity. Counsel stated he did not file a motion to limit the amount of testimony about the Petitioner's lack of a job because he believed the issue was relevant to whether the Petitioner had time alone with the victim. Counsel did not pursue a stipulation on the issue because he thought it was important for the jury to know that the victim's mother asked the Petitioner to stay at home with the victim.

Counsel stated that his strategy was to "poke holes" in the State's case. He attempted to do this by having witnesses refute the State's position that the Petitioner was always hovering around the victim and would not let her out of his sight for very long. Further, he tried to create reasonable doubt in the minds of the jurors, and he attempted to do this by cross-examining witnesses to expose inconsistencies in their testimony. Counsel stated he attempted to find direct evidence indicating that the victim and the victim's mother conjured up this story, but he was unable to locate anything of substance. Counsel said that this case was a "swearing match" from the beginning and required the jury to make a determination of whether the victim was lying about the incidents. He agreed that the jury may have "split the baby" by convicting the Petitioner of some charges and acquitting him of others.

About the testimony of specific witnesses, Counsel testified that he did not object to testimony by the Petitioner's friend, Riley, that the Petitioner packed his bags after being told to get out if he had something to hide because he wanted to show that Riley was "stabbing [the Petitioner] in the back." Further, he admitted that he never listened to a tape that was made of a conversation between the Petitioner and Riley, who was wearing a police wire. Counsel stated that he did not believe that Janie Yearwood's testimony concerning the Petitioner's demeanor towards the victim was objectionable, so he did not object. While Counsel did not call any rebuttal experts to refute Nurse Spada's testimony, he did cross-examine her with information he found on the Internet. Counsel also objected to Nurse Spada testifying about the victim's medical records from when she was a young girl, but the trial court overruled his objection and this Court determined it to be harmless error on appeal. Counsel testified that he did not request that a portion of a statement the Petitioner gave to the police be redacted because he believed it was not incriminatory.

In other relevant testimony, Counsel also stated that any witnesses not included in the initial witness list for the State would have been disclosed orally by the district attorney's office. Further, he said that the Petitioner was not interested in a deal offered by the State where the Petitioner would plead guilty to aggravated sexual battery in exchange for a ten-year sentence. Counsel also testified that he had multiple conversations with the Petitioner's mother about the victim's demeanor, and he understood that the Petitioner's mother did not trust the victim.

With regard to the Petitioner's appeal, Counsel stated that he did not raise the issue of sufficiency of the evidence on appeal because he believed it was not a strong argument. If the jury believed the State's evidence, the evidence was there for the convicted offenses.

On cross-examination, Counsel stated that he obtained most of his defense information from interviews with the Petitioner. He said he does not try and "muddy the water," and he sticks to his theory of the case. If he were to object to each and every little thing, it would be detrimental to his case and would focus the jury on things that otherwise may have passed unnoticed. Counsel testified he knew every witness the State would present, and he knew to what they would testify.

Viva Webb, the Petitioner's mother, testified that she testified at the Petitioner's trial, and she met with Counsel multiple times, one meeting of which was substantial in duration. She stated she told Counsel that she did not think that the victim or the victim's mother were afraid of the Petitioner because she had seen them stand up to the Petitioner on a number of occasions. Webb also stated that she could have testified at trial that, had the victim's mother wanted to take the victim to church or the doctor, she could have. Webb testified that it was the victim's mother's idea to home-school the victim, not the Petitioner's. Webb also stated she had frequently seen the victim change her emotions at will. She could cry "at nothing" if she did not get what she wanted. When asked whether she told Counsel of this, she responded, "I'm sure I did, but I don't remember." Webb also stated her daughter could testify to the victim's ability to change her mood quickly. On cross-examination, Webb stated that the victim acted "happy" around the Petitioner, and Webb could not recall why she did not volunteer this information at trial when Counsel questioned her on the way the victim acted around the Petitioner.

The Petitioner testified that he met with Counsel on "several occasions" ranging from ten minutes to forty minutes in length, but he never sat down with Counsel to review any of the evidence against him. The Petitioner stated that he met with the public defender's investigator, who told him of a plea offer. He stated that he was not told the consequences of rejecting the plea offer, and he did not meet with Counsel concerning the issue until the day of trial. The Petitioner stated that he was never told how much time he would have to serve if he accepted the plea offer versus the consequences of being convicted at trial. The Petitioner claimed Counsel did not understand what motive the victim's mother would have. The Petitioner also expressed only a vague understanding of whom would be testifying against him at trial.

The Petitioner testified that he provided Counsel useful information that Counsel did not use at trial. He claimed there was a neighbor, whose name he did not recall, who could have rebutted the State's witnesses' testimony. The Petitioner also told Counsel about an occasion when he saw Matt Pressley running out of the Petitioner's house after the Petitioner and the victim's mother returned from town. He testified he also told Counsel about his willingness to take the victim to the doctor and that he took her to the dentist. He stated that he gave to the investigator the name of a witness who would testify to how the victim would act around the Petitioner, but Counsel never called that witness to testify. The Petitioner also claimed that there were employment records that would show he was at work when some of incidents were alleged to have taken place, but Counsel

did not use these records.

The Petitioner further testified that the tape of the conversation between himself and Riley was not obtained because Counsel told him the tape contained no incriminating evidence. The Petitioner also stated that Counsel did not adequately pursue a motion to suppress statements given to the police after he requested an attorney.

On cross-examination, the Petitioner stated that the only witness he wanted at trial, whom Counsel did not produce, was Sherry Edwards. The Petitioner stated that he only met with Counsel five times, and Counsel never discussed sentencing ranges with him . He stated that the State offered eight years as a plea bargain, but he was not going to take a plea, regardless. The Petitioner admitted that he did not request Counsel call his next-door neighbor to rebut the State's witnesses' testimony, and the only evidence he had that Matt Pressley was having sexual relations with the victim was that he saw Matt Pressley leaving their house one time.

On re-direct examination, the Petitioner stated that, had Counsel discussed the percentage of time he would serve on the eight year offer along with the evidence against him, he might have considered a plea bargain. He also stated that the victim and Amy Yearwood would fight over Matt Pressley. On re-cross examination, the Petitioner maintained that Counsel never discussed the Petitioner's testimony with him.

Counsel was recalled and testified that he specifically discussed the years the Petitioner might receive and the percentages associated with the sentence. Counsel admitted that he did not practice a mock cross-examination of the Petitioner, but he addressed with the Petitioner the types of questions the district attorney would ask him. He also disputed the Petitioner's testimony about the number of times they met. Counsel stated they did have a few short meetings, but they also met three to four times for what Counsel termed "half-day meetings." Counsel did not recall ever hearing the name of Sherry Edwards. On cross-examination, Counsel stated that the Petitioner maintained from the beginning that he was not going to plead to anything.

Based upon this evidence, the post-conviction court denied the Petitioner's petition for post-conviction relief in a written order. It is from this order that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner claims that Counsel was ineffective by failing to: (1) file a motion to sever; (2) properly locate and interview witnesses; (3) properly prepare him to testify; (4) elicit favorable testimony from available witnesses; (5) make a motion in limine or motion to suppress evidence; (6) obtain or present counter medical proof; (7) object to irrelevant and prejudicial character evidence; (8) file a motion in limine or adequately argue a suppression motion on the Petitioner's statement; (9) raise on direct appeal the issue of the sufficiency of the convicting evidence; (10) locate and present exculpatory evidence; (11) obtain plea bargain information and properly advise Appellant of such; and (12) present medical and/or employment records.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. *Id.* at 457.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland,* 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's

perspective at the time. *Strickland,* 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

A. Failure to File Motion to Sever

At the post-conviction hearing, Counsel rebutted the Petitioner's complaint that Counsel failed to file a motion to sever by stating that he determined the best course of action with respect to the multiple counts was to try them together. Counsel claimed that it was his strategic decision to allow the jury to weigh the testimony of the victim and the Petitioner, and make one decision. Counsel also claimed that he preferred to try the charges together because he did not want to give the State a preview of the Petitioner's defense. We cannot second guess this type of informed strategic decision when viewing Counsel's actions in a petition for post-conviction relief. *See Williams*, 599 S.W.2d at 279-80. Counsel was not deficient in this regard.

B. Failure to Properly Locate and Interview Witnesses

The Petitioner next claims that Counsel was ineffective in failing to retrieve the proper information from a number of witnesses, namely, Pressley, the "neighborhood kids," and Janie Yearwood, and Counsel failed to properly investigate the Petitioner's theory of the case.

1. Matt Pressley and the "Neighborhood Kids"

With respect to Pressley, the Petitioner claims that Counsel should have been more vigilant

in pursuing a theory that any irregularities in the victim's hymen could have been caused by the victim's sexual relationship with Pressley. The Petitioner testified that the only evidence he had of a sexual relationship between the victim and Pressley was that he witnessed Pressley exiting the Webb's home while the Petitioner and his wife were away, and the victim was at home. Counsel interviewed Pressley, and Pressley denied having a sexual relationship with the victim. Because the Petitioner did not present any evidence at the post-conviction hearing concerning what he claims Counsel should have discovered, he is not entitled to relief.

With regard to the "neighborhood kids," the Petitioner claims that Counsel failed to locate and interview witnesses that would support the Petitioner's allegation about the victim's relationship with Pressley. We conclude the Petitioner has not shown deficient performance in this matter, and, because the Petitioner failed to present the witnesses at the post-conviction hearing, no prejudice can be found. When a claim of ineffective assistance of counsel is predicated upon a failure to investigate, the petitioner is obligated to show what a reasonable investigation would have revealed. *Owens v. State*, 13 S.W.3d 745, 756 (Tenn. Crim. App. 1999).

2. Janie Yearwood

The Petitioner next claims that Counsel failed to object to Yearwood's testimony and failed to locate witnesses to contradict it. Yearwood testified at trial that the Petitioner kept a close eye on the victim, preventing her from spending too much time at the Yearwood's and from even going inside the Yearwood's house. The State presented this testimony to support its position that the Petitioner was very controlling of the victim. This testimony is relevant and not unduly prejudicial. *See* Tenn. R. Evid. 401-403. Even assuming there were witnesses that could have provided rebuttal testimony, as noted above, the Petitioner must present at the post-conviction hearing whatever witnesses he claims should have been presented at trial. Failure to do so results in a failure of the prejudice prong of *Strickland*. *See Owens*, 13 S.W.3d at 756.

3. The Petitioner's theory

The Petitioner also asserts that Counsel failed to properly investigate his theory that the victim and his wife were fabricating these allegations in order to profit economically. This idea apparently stemmed from a conversation that the Petitioner had with his friend, Riley. Riley relayed information that if the Petitioner would get out of the house, the matter would be dropped. While such a statement's meaning may be debated, the Petitioner relayed his concerns to Counsel, who, in turn, investigated the issue. Counsel testified that he did not locate anything of substance to support the Petitioner's assertion, and the only way to know whether the victim's mother fabricated this story was to "get inside her head." We conclude the Petitioner has not shown deficiency on the part of Counsel because Counsel considered the Petitioner's theory, investigated it, and found nothing to support it. Additionally, the Petitioner has not shown prejudice because no evidence was presented at the post-conviction hearing to show the victim's mother actually fabricated the story.

C. Failure to Properly Prepare the Petitioner to Testify

The Petitioner next contends that Counsel failed to adequately prepare the Petitioner to testify because they only discussed the Petitioner's testimony the week before trial. Counsel admitted that he did not prepare the Petitioner by performing a mock cross-examination. However, Counsel testified that he went over, at length, the questions that the district attorney would likely ask the Petitioner. Again, we conclude the Petitioner has not shown that Counsel was deficient in this matter, but, even if he was, there is no showing of any prejudice as a result of inadequate preparation.

D. Failure to Elicit Favorable Testimony From Available Witnesses

Next, the Petitioner asserts that Counsel was ineffective because he failed to elicit testimony from the Petitioner's mother, Viva Webb, that the victim could change her mood at will, crying virtually on command. Webb testified as such at the post-conviction hearing. The Petitioner claims this was important because of the victim's crying during her testimony at trial. When asked at the post-conviction hearing whether she told Counsel this, Webb responded, "I'm sure I did, but I don't remember." This equivocal statement is insufficient evidence upon which to conclude Counsel acted in a deficient manner. However, even if Viva Webb told Counsel about this, and Counsel proceeded to elicit such testimony at trial, we cannot conclude that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Nichols*, 90 S.W.3d at 587.

E. Failure to Make a Motion in Limine to Suppress Evidence

The Petitioner next contends that Counsel was ineffective in failing to prevent Kathy Spada, the State's medical expert, from testifying to the victim's condition. Although Counsel objected to Spada's testimony at trial, it was overruled. On appeal, this Court determined that ruling was harmless error. *State v. Floyd "Butch" Webb*, 2004 WL 199824, No. E2002-01989-CCA-R3-CD, at *13-14 (Tenn. Crim. App., at Knoxville, Feb. 3, 2004). The Petitioner now claims that, had Counsel made a motion in limine concerning the presentation of this evidence, he might have won that motion. Because we determined on appeal that the error in admitting the medical evidence was harmless, the Petitioner cannot show prejudice, regardless of when the motion was made.

F. Failure to Obtain or Present Rebuttal Medical Proof

The Petitioner next argues that Counsel failed to present medical proof to rebut Kathy Spada's testimony that the victim's hymen abnormality was consistent with the victim's allegations against the Petitioner. No evidence was presented at the post-conviction hearing regarding what rebuttal evidence the Petitioner alleges Counsel should have used. No medical expert testified at the post-conviction hearing as to other possible causes of the victim's hymen abnormality, and the Petitioner has not demonstrated that, had such evidence been presented, it would have effected the outcome of trial. *See Owens*, 13 S.W.3d at 756.

G. Failure to Object to Irrelevant and Prejudicial Character Evidence

The Petitioner next contends that Counsel was ineffective in failing to prevent the admission of testimony regarding the Petitioner's lack of church attendance and failure to work. At trial the State sought to admit this evidence to show the Petitioner had opportunities to be alone with the victim at home. The Tennessee Rules of Evidence allow the exclusion of evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

Here, the Petitioner claims that the introduction of evidence concerning the Petitioner's lack of church attendance and failure to work were unfairly prejudicial to the Petitioner because the jury could have focused on the fact that the Petitioner was lazy and irreverant towards religion. At the post-conviction hearing, Counsel testified that he believed the evidence was admissible because it was relevant to show opportunity. Additionally, Counsel noted that it was a matter of trial strategy in determining whether to object to questionable evidence. A sustained objection would needlessly draw attention to evidence to which Counsel did not wish to draw attention. Because this evidence was arguably admissible at trial, it was properly a matter of trial strategy for Counsel to refrain from objecting. The Petitioner has not carried his burden on this issue.

H. Failure to File a Motion in Limine or Adequately Argue Suppression Motion on Appellant's Statement

The Petitioner's next assertion centers around a statement given to the police concerning where the victim might have learned about sex. The Petitioner told the police that the movie "Knotting Hill" was the likely culprit. The Petitioner now argues that Counsel should have made a motion in limine to suppress the statement. However, the Petitioner cites no authority upon which such a motion would be based. Assuming the Petitioner is asserting that this statement is unfairly prejudicial under Rule 403, we again conclude that it was well within Counsel's scope of trial strategy to decide not to draw attention to this statement.

I. Failure to Appeal Sufficiency of the Evidence

The Petitioner next contends that Counsel was ineffective in failing to appeal the sufficiency of the evidence. The Petitioner was convicted by a jury on four counts of child abuse, one count of aggravated sexual battery, and two counts of sexual battery.

1. Child Abuse - Counts 1, 2, 3, and 4

The Petitioner's four convictions for child abuse came as lesser-included offenses of aggravated sexual battery of a child. T.C.A. § 39-15-401(d) (2003); *State v. Elkins*, 83 S.W.3d 706, 710 (Tenn. 2002). Tennessee Code Annotated section 39-15-401(a) states, "Any person who knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such

a manner as to inflict injury . . . commits a Class A misdemeanor." *State v. Ducker* interpreted the statue to require that the child actually sustain an injury. 27 S.W.3d 889, 896 (Tenn. 2000). Although "injury" is not defined by statute, "bodily injury" is defined as follows, and is a useful guide: "Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty[.]" T.C.A. § 39-11-106(2) (2003).

The Tennessee Supreme Court addressed a similar issue in the case of *Elkins*. In *Elkins*, the Court described the incident as follows:

> On July 11, between midnight and two a.m., AJ (the victim) was awakened by someone lying on top of her. Believing it was Linda (the victim's friend), AJ repeatedly said "Linda get off of me." Receiving no response, AJ tried to get up, at which point the defendant told her to "shut up." AJ tried to scream and kick him off, but the defendant put his hand over her mouth and held her down. Despite her repeated attempts to defend herself, AJ said the defendant continued to hit her and repeatedly tried to "put his penis in my vaginal area." AJ was not certain if penetration occurred, but she testified that "it hurt really bad." The defendant told AJ not to tell anyone what had happened, then he walked out of the room, took a shower, and left for work. AJ said she sustained bruises to her arms, legs, and chest as a result of the attack.

Elkins, 83 S.W.3d at 708. The Court determined that, on these facts, the jury should have been instructed on the offense of child abuse. *Id.* at 711-12. The Court stated:

> Applying this statute, therefore, child abuse is a lesser-included offense of rape of a child, the offense with which the defendant was charged. Moreover, viewing the evidence presented at trial liberally in the light most favorable to the existence of the lesser-included offense, without making any judgments on the credibility of such evidence, we conclude that an instruction on child abuse was warranted in this case because the evidence, viewed in this light, is legally sufficient to support a conviction of child abuse. AJ testified that the defendant held her down, that she attempted to fight him off, and that she sustained bruises on her body as a result of the defendant's conduct. Two other witnesses testified to seeing the bruises. Certainly, this evidence is legally sufficient to support a conviction of child abuse, which requires only proof that a person knowingly, other than by accidental means, treats a child under eighteen in such a manner as to inflict injury. Accordingly, we conclude that the trial court erred in failing to instruct the jury as to child abuse.

Id. This Court, in *State v. Matthew Kirk McWhorter*, also addressed this issue in the context of jury instructions, and we determined that the jury should not be instructed on child abuse when there is no evidence of a bodily injury. No. M2003-01132-CCA-R3-CD, 2004 WL 1936389, at *38-39 (Tenn. Crim. App., at Nashville, Aug. 30, 2004). We determined that evidence of the Defendant

touching the victim's penis, putting his mouth on the victim's penis, and requiring the victim to put his mouth on the Defendant's penis was insufficient evidence to support a charge of child abuse. *Id.*; *accord State v. John Whatley*, No. M2003-01773-CCA-R3-CD, 2004 WL 1964710, at *6-8 (Tenn. Crim. App., at Nashville, Dec. 22, 2004) *perm. app. denied* (Tenn. May 9, 2005). While this case is not in the same precise posture as the cases above, the facts and legal conclusions are instructive as to what may be sufficient evidence for injury. Keeping these cases in mind, we turn to the individual counts and convictions.

Count 1 centers around the conduct that began the inappropriate relationship. The victim testified that the Petitioner came into her room one night after he got home from work, got into the victim's bed, and touched the victim's breasts and vagina. The victim testified that she laid in the bed, acting as if she was asleep. The Petitioner's touching scared the victim, and, the next morning, the Petitioner told the victim in a threatening manner not to tell her mother. During this period of time, the Petitioner had begun to get rough with the victim in his physical discipline, and he had hurt her. Because of this, the victim was scared to tell her mother.

Count 2 concerns conduct in July 1995, where the victim testified that the Petitioner again arrived home at 1:00 a.m., and he came into the victim's bedroom, got under her covers, and touched her breasts and vagina. The victim testified that the Petitioner did this almost every night throughout the month of July, and she asked him once to stop, for which the Petitioner whipped her.

Count 3 concerns actions occurring around Thanksgiving, 2005, when the Petitioner came into the victim's room wearing a Batman mask. The victim was scared, and her mom and aunt came in to calm her down. After they left the victim's room, the Petitioner came back in and apologized for scaring her. The Petitioner then rubbed the victim's breasts and vagina. The victim testified that she pushed his hands away, but that did not stop him.

Count 4 involves actions occurring around Christmas, 2005. The victim testified that the Petitioner "would hold me down in the bedroom floor. He would get me in a headlock. He would act like he was tickling me and then he would just start messing around and rubbing my breasts and vagina again." The victim first stated that the Petitioner put his fingers inside her, but she then stated she was not so sure.

In our view, only the facts supporting Count 2 provide legally sufficient evidence to find the Defendant injured[3] the victim: the victim testified she was whipped when she asked the Defendant

[3]We note that one may argue that the legislature intended the acts that give rise to a charge of sexual battery be considered "injuries" under the child abuse statute. This idea is supported by the legislature's use of the word "injury" instead of "bodily injury," thus potentially encompassing the type of touching in issue here. Additional support is found in the legislatures directive in Tennessee Code Annotated section 39-15-401(d), which specifically makes child abuse a lesser included offense of sexual battery if committed on a child. This might lead one to logically interpret the statute to cover the "injury" inherently associated with sexual molestation which does not result in bruises, cuts, or other pain normally identified with child abuse. However, opposite would be the simple fact that there are crimes that cover such actions: sexual battery and aggravated sexual battery. Thus, one might

to stop. Counts 1, 3, and 4 do not involve any allegation of injury of any type. The victim did not testify she was hurt in any way, whether bruising, cut, abrasion or other physical pain, or mental impairment. Counsel's failure to appeal the sufficiency of evidence on three of the four counts of child abuse is, thus, deficient. Also, had Counsel appealed the issue, there is a reasonable certainty that the Petitioner would have succeeded in having the convictions overturned. Thus, the Petitioner has proven prejudice by clear and convincing evidence. The Petitioner is entitled to relief on this issue, and, pursuant to Tennessee Code Annotated section 40-30-111, we reverse and dismiss Counts 1, 3, and 4 of the indictment against the Petitioner, each being a conviction for misdemeanor child abuse. We affirm the judgement as to Count 2.

2. Aggravated Sexual Battery - Count 7

Tennessee Code Annotated section 39-13-504 states: "Aggravated sexual battery is unlawful sexual contact with a victim by the defendant . . . by any of the following circumstances: . . . (2) The defendant causes bodily injury to the victim; . . . or (4) The victim is less than thirteen (13) years of age." "Sexual contact" is defined as follows:

> [T]he intentional touching of the victim's, the defendant's or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, in that intentional touching can be reasonably construed as being for the purpose of sexual arousal and gratification.

T.C.A. § 39-13-501(6) (2003). At trial, evidence was presented that the Petitioner intentionally touched the nine-year-old victim's breasts and vagina, and the jury could have reasonably construed that touching to be for the purpose of sexual arousal and gratification. There is sufficient evidence to support this conviction, and Counsel was not deficient in declining to raise the issue on appeal.

3. Sexual Battery - Counts 9 and 11

Tennessee Code Annotated section 39-13-505 states: "Sexual battery is unlawful sexual contact with a victim by the Defendant . . . by any of the following circumstances: (1) Force or Coercion is used to accomplish the act; [or] (2) The sexual contact is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the contact that the victim did not consent . . . ."

At trial, the State presented evidence that the Petitioner had unlawful sexual contact with the victim, and he had reason to know that she did not consent to such contact. Thus, Counsel was not deficient in declining to raise this issue on appeal.

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argue, there is no need to extend child abuse to cover this type of "injury." We feel constrained, at this juncture, to limit "injury" to actual bodily injury as stated in the above cited cases.

J. Failure to Locate and Present Exculpatory Evidence

The Petitioner next contends that Counsel was ineffective in failing to locate and present the tape recording made of the conversation between the Petitioner and his friend, Riley. This recording was made at the request of the police, and Riley wore a wire and went to speak with the Petitioner. The Petitioner apparently made no incriminating statements and, in fact, continued to protest his innocence. At trial, the Petitioner testified, and the case essentially was reduced to a "swearing match" that pitted the victim against the Petitioner. The Petitioner now claims that, had this prior consistent statement been presented, his credibility would have been bolstered due to the circumstances surrounding the prior statement. The State told the post-conviction court the following in relation to the tape:

> It was a tape. I have no idea where the tape is. We wired up a man to go up there and talk to him. The officer, I think, listened to the tape and again, it was non-committal. He never ever even said much of anything about what had happened. The tape would require him to speak into it to get the evidence and he could have said anything. I don't think it would have helped him out either, because he could have said self serving statements. There was nothing in that tape that would help him out at all in this post-conviction appeal. Even if he got in there and said, I didn't do it, I didn't do it, he had the right to take the stand, or he could have got that in through some other way that he said he didn't do it, he didn't do it, which is exactly what his statement said when he gave it to Dana Morgan with Chris Sneed being there, I didn't touch her, I didn't have anything to do with this, I never had sex with her, and we actually read that thing into the record. If nothing else, it gave him an opportunity where he wouldn't even have to testify, but we put it in anyway, I believe.

Counsel testified at the post-conviction hearing that, "I do not show that I ever, that they could ever find the tape, so I don't remember ever listening to the tape." Counsel also testified:

> [The Petitioner] also told me when I asked about this, I think it was something like at the trash dump where he was supposedly wired, where [Riley] was wired, that, you know, [the Petitioner] told me he was asking some odd questions. [The Petitioner] just told him, you know, I didn't do anything, you know, this is crazy. [The Petitioner] did not [lead] me to believe there would be anything on the tape good or bad other than him just saying I didn't do this.

Counsel further stated that the State could not find the tape, and he was never given the tape.

Prior consistent statements are generally inadmissible under the rules of evidence. The statement would be hearsay, not subject to the "admission by a party opponent" exception because the party would be attempting to admit it. Tenn. R. Evid. 801, 802 & 802(1.2). The Petitioner, however, may have gained admission of the statement for the limited purpose of supporting his

credibility if it had been attacked on cross-examination. *See State v. Meeks*, 867 S.W.2d 361, 374 (Tenn. Crim. App. 1993). In *Meeks*, we stated:

> Ordinarily, it is impermissible to corroborate a witness' testimony by evidence of the witness making prior consistent statements, absent an impeaching attack on that testimony. The defendants contend that the victim had not been impeached, only subjected to cross-examination. However, the impeaching attack which allows for corroboration may occur during cross-examination of the witness. (Internal citations omitted).

Id. (citing *Sutton v. State*, 291 S.W. 1069 (Tenn. 1927) and *State v. Braggs*, 604 S.W.2d 883, 885 (Tenn. Crim. App. 1980)).

While the tape was arguably admissible, we are unable to find Counsel deficient in this respect because the Petitioner failed to obtain the tape and introduce it at the post-conviction hearing. We may only speculate as to whether the tape was lost at the time of trial and, alternatively, to what lengths Counsel should have gone to discover the tape if it was in the State's possession. When a claim of ineffective assistance of counsel is predicated upon a failure to investigate, the petitioner is obligated to show what a reasonable investigation would have revealed. *Owens,* 13 S.W.3d 756.

K. Failure of Counsel to Obtain and Convey Plea Bargain Information to the Petitioner

The Petitioner next argues that Counsel was ineffective in failing to properly advise him of plea bargain information in a timely manner. At the post-conviction hearing, the Petitioner testified that he was told by Counsel's investigator about a potential plea bargain the day before trial, and he rejected it. Counsel testified that the Petitioner was continuously adamant that he would not accept a plea bargain, thus, Counsel was merely following his ethical responsibilities by conveying the offer he received the day before trial. *See* Tenn. Sup. Ct. R. 8, RPC 1.4. We conclude Counsel was not deficient in this respect, and the Petitioner cannot prove prejudice as he maintained that he would not have accepted a plea bargain.

L. Failure to Present Medical and/or Employment Records

Finally, the Petitioner asserts that Counsel was ineffective in failing to present employment records to contradict the State's assertion that the Petitioner did not work, and Counsel failed to find and present the victim's medical records to contradict the State's medical evidence. When a claim of ineffective assistance of counsel is predicated upon a failure to investigate, the petitioner is obligated to show what a reasonable investigation would have revealed. *Owens*, 13 S.W.3d at 756. The Petitioner did not present these records at the post-conviction hearing, and, thus, he cannot show prejudice. The Petitioner is not entitled to relief on this issue.

III. Conclusion

Based on the foregoing reasoning and authority, we conclude the Petitioner has proven by clear and convincing evidence that he did not receive the effective assistance of counsel with respect to the direct appeal of three of his four convictions of child abuse. However, the Petitioner failed to proved by clear and convincing evidence that he did not receive the effective assistance of counsel in his convictions for Child Abuse, Count 2, Aggravated Sexual Battery, Count 7, and Sexual Battery, Counts 9 and 11. As such, we affirm in part and reverse in part the judgment of the trial court. The Petitioner's convictions of child abuse in Counts 1, 3, and 4 of the indictment against the Petitioner are reversed and dismissed.

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ROBERT W. WEDEMEYER, JUDGE